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No. 10-90

Supreme Court, U.S.
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In The
Supreme Court of the United States

UNITED FINANCIAL SYSTEMS, CORPORATION, *et al.*,

Petitioners,

v.

STATE OF INDIANA, ex rel. INDIANA STATE BAR ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Indiana

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Petitioners, United Financial Systems, Corporation ("UFSC"); Richard Follett; Jayne A. Follett; Richard L. Follett II; Beau R. Follett; James Boyles; Raymond C. Phillips; Sharon Dorsey; Sherry Jordan; Jody Waugh; Gary Lovelady; and John Joyce (the "Petitioners"), respectfully submit their reply to the brief in opposition filed by Respondent, State of Indiana, ex rel. Indiana State Bar Association (the "ISBA").

I. EVEN THE ISBA FAILED TO IDENTIFY ANY INDIANA CASE LAW PROHIBITING THE CONDUCT AT ISSUE

The ISBA claims that Rule 24 is not vague because "the Indiana Supreme Court has defined Rule 24 through decades of case law." Br. in Opp., p. 20. While it is true that the court has defined some conduct as the unauthorized practice of law ("UPL") through case law, the ISBA fails to mention that there are ***no*** Indiana cases addressing facts similar to the ones in this case – where all legal advice and drafting was performed by licensed Indiana attorneys.

As a preliminary matter, the ISBA's assertion that Rule 24 is clearly defined is contrary to assertions that its officers have made on its behalf in the past. In a 2002 letter to the American Bar Association

("ABA"),[1] Attorney John Conlon, the then-chair of the ISBA's UPL Committee, submitted comments regarding the ABA's proposed Model Definition of the practice of law. Conlon stated in part:

> In my view, the present situation is that there is a distinct lack of clarity and uniformity in the UPL area throughout the country. What constitutes UPL activity varies widely among the states. The result is that there exists a crazy quilt of case law and interpretation of existing professional rules that **has left both the general public as well as members of the bar confused about what actually constitutes the unauthorized practice of law**.
>
> Also adding to the problem is that state courts tend to be very tepid in their UPL decisions. **In Indiana, while our state supreme court generally has not ventured beyond the context of the specifics of the facts presented in UPL cases to lay down many "markers" which could be used to judge UPL conduct in other types of situations – particularly with regard to non-lawyers who may be engaged in the unauthorized practice of law**. A more expansive definition of what constitutes the practice of law could only

[1] This letter was Exhibit 3 to Petitioners' "Reply Brief In Support Of Motion to Dismiss Or, In the Alternative, Motion to Strike" during the proceeding below. *See also* Defendant's Trial Exhibit 149.

> serve to provide clarity not only to the general public and members of the bar, but also to state courts that must deal with UPL issues.

(emphases added). The concerns expressed by Conlon in his capacity as the chair of the ISBA's UPL Committee highlight the deficiencies of Rule 24, which does not provide any guidance as to what conduct is specifically prohibited and instead merely provides a blanket prohibition of "the unauthorized practice of law." Ind. R. Admis. B. & Disc. Att'y 24. Although the ISBA contends that UPL has been defined by a "plethora of case law," (Br. in Opp. at 23), as the letter from the ISBA's former UPL Committee Chair recognizes, UPL does not have a settled legal meaning, and reasonable minds can differ as to what conduct constitutes a violation.

The only Indiana case upon which the ISBA relies for its argument that the Petitioners were on notice that their conduct was prohibited is *State of Ind. ex rel. Ind. State Bar Assoc. v. Northouse*, 848 N.E.2d 668 (Ind. 2006). Br. in Opp. at 22-23. In *Northouse*, the court found non-attorneys guilty of UPL for drafting estate plans and providing legal advice ***without any attorney review or involvement***. *Northouse*, 848 N.E.2d at 673. In contrast, here, all legal documents that UFSC's customers received were drafted by Indiana attorneys after the attorney contacted the individual and assessed his needs using independent professional judgment. The fact that attorneys drafted the legal documents and

provided the legal advice is a crucial distinction between the facts of this case and the facts of *Northouse*. The ISBA makes no attempt to explain how a case prohibiting the drafting of estate plans by non-attorneys absent attorney involvement puts the public on notice that businesses are prohibited from referring individuals to attorneys for estate planning services. There was no Indiana case law regarding the role that non-attorneys could play in the marketing of estate planning assistance services, where all individuals were referred to attorneys who drafted estate plans on a case-by-case basis.

The ISBA also argues that the Petitioners were on notice that their conduct was prohibited in Indiana because Ohio prohibits such conduct. Br. in Opp. at 26-27. The ISBA cites to the consent decree UFSC entered into in Ohio admitting that its business model was UPL under Ohio law as evidence that the Petitioners knew their conduct was unlawful in Indiana. *Id.* The consent decree upon which the ISBA relies is not part of the record, and the Indiana Supreme Court specifically rejected the ISBA's request to make it part of this record. (ISBA's October 9, 2008 Motion For Leave to Supplement the Record; November 20, 2009 Order denying Motion.) Regardless, the fact that UFSC admitted to UPL under Ohio law has no bearing on whether the Petitioners were on notice that their conduct was prohibited in Indiana, because Indiana and Ohio law contained important distinctions.

For example, Ohio prohibits attorneys from assisting organizations that pay for legal services to others to promote use of the lawyer's services, but Indiana law does not contain a parallel prohibition. *See* Ohio Disciplinary R. 2-103(D). Similarly, Ohio law prohibits attorneys from requesting that an organization recommend the lawyer's services, whereas Indiana law generally only limits recommendations from lawyer referral services. *See* Ohio Disciplinary R. 2-103(C); Ind. Prof. Cond. R. 7.3. Most significantly, in 2007 the Ohio Supreme Court made it clear that business models like the one used by UFSC would be prohibited in Ohio.

Specifically, in *Cincinnati Bar Assoc. v. Heisler*, 866 N.E.2d 490 (Ohio 2007) and *Disciplinary Counsel v. Kramer*, 866 N.E.2d 498 (Ohio 2007), the Ohio Supreme Court indicated that a company would commit UPL if a non-attorney gave a presentation about probate to consumers and collected a check, even if an attorney later dispensed legal advice and prepared all legal documents, essentially creating a *per se* UPL violation for providing in-person presentations about probate. After UFSC became aware that presentations by non-attorneys will constitute UPL under Ohio law even in the absence of proof that the non-attorney gave legal advice or drafted legal documents, UFSC began exiting the Ohio market, with its exit concluding in 2008. Because of the Ohio Supreme Court opinions that put it on notice that its conduct was prohibited, UFSC admitted that its business model was UPL under Ohio law, and UFSC was

permitted to exit the Ohio market without imposition of any monetary penalty.

In contrast, the Petitioners were not on notice that UFSC's business model was unlawful in Indiana because Indiana had never previously held that in-person presentations regarding probate were a violation of Indiana's UPL prohibition. This crucial difference between Indiana and Ohio law renders UFSC's admission that it engaged in UPL under Ohio law irrelevant to this proceeding. Furthermore, as the ISBA's former UPL Committee Chair explained to the ABA, there is a distinct lack of clarity and uniformity regarding UPL throughout the country. What constitutes UPL varies widely among States, resulting in a crazy quilt of case law and interpretation of professional rules that has left both the public and attorneys confused about what constitutes UPL. Indeed, Montana even provides a licensing procedure by which non-attorneys can register to sell trusts, indicating that UFSC's business model is likely lawful in Montana. Mont. Code § 30-10-904. Individuals should not be required to guess whether Indiana will follow Ohio or Montana law. Moreover, only one of the Petitioners in this proceeding was a party to the Ohio proceeding – UFSC. The remaining Petitioners were not parties to the Ohio proceeding or the consent decree, and any admissions made cannot be held against them.

The ISBA also criticizes the UFSC Respondents for purportedly "ignoring" the advice of Attorney Bruce Kotzan (Br. in Opp. at 24-25), who advised UFSC:

> It is my opinion that you can employ attorneys to represent individuals in the course of your marketing of estate planning products, but the lawyer's representation of the clients must truly be independent. The attorney must represent the client and not the company. There must be contact between the client and the attorney. In the event employees of the company engage in the gathering of information for the preparation of documents these employees must be acting under the direction of the attorney.

After UFSC received Kotzan's advice, it took steps to comply with many of his recommendations. Indeed, all of the attorneys to whom UFSC referred customers were independent contractors who did not represent UFSC, in accordance with Kotzan's suggestion. The attorneys' decisions regarding the estate planning needs of the individual customers were never questioned by UFSC, and the attorneys were free to decide that an individual did not need any estate plan. In accordance with Kotzan's recommendation, the attorneys to whom UFSC referred customers always contacted the individual directly to assess the person's legal needs.

The only advice by Kotzan which was arguably not followed was his suggestion that UFSC's representatives who gather information from customers should act under the direction of an attorney. Kotzan did not cite any Indiana law to support this suggestion and did not make any reference to Rule 24. UFSC received contrary legal advice from other

attorneys which seemed more credible given that members of the public are allowed to collect the same information for other purposes, such as the sale of insurance, absent attorney supervision. Regardless, an unsupported statement in an attorney's opinion letter does not create Indiana law or provide notice to the public as to what conduct is prohibited. The State of Indiana has an obligation to announce what conduct is prohibited prior to punishing that conduct, and that obligation was not met.

The ISBA also suggests that the Petitioners knew that their conduct was prohibited because "UFSC devoted substantial resources to training its employees as to the boundaries of the practice of law." Br. in Opp. at 26. UFSC wholeheartedly agrees that it devoted substantial resources to train its representatives about UPL to the best of its ability to discern what conduct was lawful in Indiana. As a conscientious corporate citizen, UFSC wanted to ensure that its conduct complied with the law. Unfortunately, because the law was undefined, these efforts failed. The fact that UFSC could take these precautions and the Petitioners can still end up with monetary penalties imposed against them demonstrates the inherent injustice of Rule 24's enforcement.

Additionally, the ISBA criticizes the Petitioners for "tread[ing] so close to the line" between lawful and unlawful conduct. Br. in Opp. at 26. This argument only reinforces the Petitioners' point that Rule 24's vagueness will ultimately force the public to steer-clear of any conduct even touching-upon legal

subjects. If Indiana wants to prohibit UFSC's business model, or other business models, it is free to do so. If Indiana wants to define UPL through case law, it is free to do so. However, the federal constitution does not permit the State to penalize conduct until such time as the public is on notice that the conduct is prohibited. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[t]he dividing line between what is lawful and unlawful cannot be left to conjecture").

II. THE ISBA OVER-STEPPED CONSTITUTIONAL LIMITATIONS IN ITS PROSECUTION OF THIS ACTION BY INJECTING A PERSONAL FINANCIAL INTEREST INTO THE ENFORCEMENT PROCESS

The ISBA argues that it did not violate the Petitioners' due process rights by requesting a substantial monetary payment from them in exchange for reducing the time period for which it would seek disgorgement of fees collected by UFSC from fourteen years to two years. Br. in Opp. at 27-31. The ISBA defends its request by arguing that the court would need to approve any settlements. *Id.* Whether the ISBA ultimately would have sought court approval if the Petitioners had agreed to pay makes no difference with respect to the Petitioners' due process challenge, because the fact that a direct monetary payment was requested is enough to undermine the reliability of the proceeding. *See Adkins v. Commonwealth*, 492 S.E.2d 833, 835 (Va. Ct. App. 1997)

(the "prosecutor is vested with a duty not merely to convict, but to see that accused receives fair and impartial trial" . . . where a prosecutor has a "personal interest in the outcome of the prosecution, his objectivity and impartiality are called into question and a defendant's right to a fair and impartial trial is violated") (citations and quotations omitted).

Indeed, even if the ISBA had hypothetically submitted its proposal to the court for approval and the court had rejected it, the Petitioners' due process rights still would have been violated by the ISBA's continued prosecution of the action, because the ISBA has already demonstrated that improper factors entered into the prosecutorial decision-making process. There is no scenario that "cures" the due process violation because the ISBA's attempt to receive a payment from the Petitioners brings the ISBA's motives into question and creates a moral hazard that is inherently inconsistent with due process.

The ISBA argues that it should be entitled to request substantial monetary payments from individuals it prosecutes, analogizing itself to a government agency seeking reimbursement for expenses incurred in the enforcement process. Br. in Opp. at 30-31. Yet, the ISBA sought to gain much more than its expenses from the Petitioners. The ISBA separately specified in its "settlement" letter that the Petitioners would be required to pay all of the ISBA's attorney's fees and costs, in addition to the substantial payment it requested. Thus, the requested

payment cannot be classified as a mere reimbursement of expenses.

Furthermore, the ISBA's argument ignores the fact that it is not a government agency existing solely for purposes of protecting the public. Instead, it is an organization with many other objectives, including serving its members, who have an interest in discouraging non-attorneys from competing with attorneys. The ISBA has provided no legitimate explanation as to how its role as prosecutor can be constitutionally reconciled with its request for a substantial payment to itself.

III. RULE 24 ACTIONS REQUIRE DUE PROCESS SAFEGUARDS

The ISBA argues that the constitutional concerns raised by the Petitioners are inapplicable because defendants charged with Rule 24 violations are not entitled to due process. Br. in Opp. at 14-19. The ISBA argues that UPL proceedings are not quasi-criminal in nature but are instead akin to attorney disciplinary actions. *Id.* at 15. Yet, UPL proceedings and attorney disciplinary proceedings have critical differences. Most significantly, attorney disciplinary proceedings are always brought against individuals who voluntarily consent to the disciplinary process as a condition of bar membership. In contrast, Rule 24 cases are enforcement actions brought against members of the public on behalf of the State alleging that the accused engaged in prohibited conduct. This

description encapsulates the quintessential elements of a criminal proceeding, indicating that Rule 24 charges are quasi-criminal and require due process.

Moreover, Rule 24 charges are brought pursuant to the state's regulatory power, providing further evidence that such proceedings require due process. Although the Indiana Supreme Court has stated that the purpose of Rule 24 "is not to find fault or assess liability," liability is nonetheless found in these proceedings, and offenders who are found guilty may be subject to significant monetary penalties, like the penalties imposed here. Furthermore, the Indiana Supreme Court has stated that the Rule 24 disgorgement remedy is for purposes of deterrence. *Northouse*, 848 N.E.2d at 674 (disgorgement is "appropriate to deter similar conduct in the future"). Where a rule is predicated on deterrence, due process is implicated. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976) (the Court would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness").

The ISBA argues that if Rule 24 actions require due process, Indiana's criminal UPL provision would be rendered "superfluous." Br. in Opp. at 16. This argument fails because a State's decision to prohibit conduct under two separate laws cannot divest the accused of due process rights. Otherwise, States could routinely prohibit conduct under two laws to circumvent constitutional protections. Additionally, when the two laws were originally enacted, they were not superfluous because the criminal statute was

designed to punish past conduct, while Rule 24 was designed to enjoin future conduct. This distinction has waned now that disgorgement is a remedy for past conduct under Rule 24.

The ISBA also argues that the Petitioners are not entitled to due process because disgorgement is not a penalty but is an "equitable remedy designed to nullify any unjust enrichment when fees or other property are improperly acquired." Br. in Opp. at 11. Yet, this argument presupposes that the Petitioners had notice that their conduct was prohibited. Where an accused was not on notice that his conduct was prohibited such that he could intelligently choose in advance whether to engage in the conduct, it would be extremely inequitable to deprive him of his property. Furthermore, the ISBA's argument ignores that disgorgement was ordered not only against UFSC – the entity that collected the fees – but also against former representatives of UFSC who had no ownership interest in the corporation. These individuals are not being asked to return property that they unlawfully collected – they are liable to disgorge money that they never received in the first place, entitling them to due process.

CONCLUSION

For foregoing reasons, the Petitioners respectfully request that this Court GRANT their petition and issue a writ of certiorari.

Respectfully submitted,

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